A

PP v. UMAPATHI GANESAN

HIGH COURT MALAYA, MELAKA
MOHD RADZI ABDUL HAMID J
[CRIMINAL TRIAL NO: MA-45A-05 & 06-12-2016]
21 AUGUST 2023

B

Abstract – *While the Abolition of Mandatory Death Penalty Act 2023 ('Act') does not abolish the death sentence in its entirety, be it as it may, the Act was enacted with the spirit and intention of preserving life. Therefore, in accordance with the spirit and intent of the Act, life imprisonment and whipping should be the preferred sentence under s. 39B(2) of the Dangerous Drugs Act 1952, unless the aggravating factors in a particular case are exceptionally serious and outweigh the mitigating factors.*

C

D ***CRIMINAL LAW:*** *Offences – Dangerous drugs – Sentencing – Accused charged for four counts under Dangerous Drugs Act 1952 and Poisons Act 1952 – Court's discretion to pass life imprisonment sentence together with whipping instead of death – Whether accused person's life shall terminate at gallows or spared under life imprisonment with minimum of 12 strokes of whipping – Whether aggravating* E *factors exceptionally serious and outweighed mitigating factors – Whether life imprisonment and whipping should be preferred sentence – Dangerous Drugs Act 1952, ss. 39B(2), 39B(2A) & 39B(2B) – Abolition of Mandatory Death Penalty Act 2023, s. 54*

CRIMINAL PROCEDURE: *Sentencing – Principles – Dangerous drugs – Accused* F *charged for four counts under Dangerous Drugs Act 1952 and Poisons Act 1952 – Court's discretion to pass life imprisonment sentence together with whipping instead of death – Whether accused person's life shall terminate at gallows or spared under life imprisonment with minimum of 12 strokes of whipping – Whether aggravating factors exceptionally serious and outweighed mitigating factors – Whether life* G *imprisonment and whipping should be preferred sentence – Dangerous Drugs Act 1952, s. 39B(2), (2A) & (2B) – Abolition of Mandatory Death Penalty Act 2023, s. 54*

The accused was stopped and approached by the police as he was seen behaving suspiciously. The accused then threw a plastic bag into some H bushes. A search led to the discovery of the said plastic bag which turned out to contain drugs. The accused was charged, and eventually convicted, for offences under: (i) s. 39B(1) read together with s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA') for the trafficking of 94.99g of heroin ('first conviction'); (ii) s. 12(2) read together with s. 39(2A) of the DDA for the I possession of 10.15g of monoacetylmorphines ('second conviction'); (iii) s. 12(2) read together with s. 12(3) of the DDA for the possession of 4.21g of methamphetamine ('third conviction'); and (iv) s. 30(3) read together with s. 30(5) of the Poisons Act 1952 for the possession of

phenazepam ('fourth conviction'). At the request of the accused, and absent any objection from the prosecution, the passing of the sentence under s. 39B(2) of the DDA was deferred until after the amendments under the DDA, pursuant to the Abolition of Mandatory Death Penalty Act 2023 ('Act'), took effect. The sentencing for all the remaining convictions was also deferred to the same date. In his plea of mitigation, the accused submitted that: (i) he was a first offender and was 25 years old at the time of the arrest; (ii) he did odd jobs to support his mother and a sibling; (iii) although the amount of heroin was high, *ie,* 94.99g, the accused had given full cooperation to the police and he was not caught in the act of selling dangerous drugs; and (iv) death sentence was not appropriate to be passed in this case and the accused should instead be sentenced to life imprisonment and the minimum of 12 strokes of whipping.

Held (sentencing accused to imprisonment for life and 15 strokes of whipping under first conviction; two years' imprisonment and three strokes of whipping under second conviction; six months' imprisonment under third conviction; and six months' imprisonment under fourth conviction):

(1) Section 54 of the Act made changes to only two aspects of s. 39B of the DDA, namely: (i) it reduced the minimum number of whippings from 15 to 12 strokes; and (ii) it abolished s. 39B(2A) and (2B) of the DDA with regards to the statutory grounds permitting the court's discretion to pass a life imprisonment sentence together with whipping instead of death. Notwithstanding that the death penalty under s. 39B(2) of the DDA remained unaffected by the Act, the abolishment of s. 39B(2A) and (2B) of the DDA brought about significant changes to the court's powers in passing sentences. The abolishment of s. 39B(2A) of the DDA effectively removed the 'unless' effect of that provision, where unless the conditions in s. 39B(2A) of the DDA could be satisfied, then the court would have no choice but to pass the death sentence. By removing s. 39B(2A) of the DDA, the statutory limits to the conditions that could justify the exercise of the court's discretion in passing a sentence of life imprisonment had now been removed. The current law now placed total discretion in the hands of the court to decide whether, in any given case, a convicted person's life shall terminate at the gallows or spared under a life imprisonment with a minimum of 12 strokes of whipping. (paras 14-16)

(2) Although the Act did not abolish the death sentence in its entirety, the Act was enacted with the spirit and intention to preserve life. Thus, in consideration of the spirit and intent of the Act, unless the aggravating factors were exceptionally serious and outweighed the mitigating factors in any particular case, life imprisonment and whipping should be the preferred sentence under s. 39B(2) of the DDA. (paras 17 & 20)

(3) The mitigating factors in favour of passing a life sentence outweighed the aggravating factors. This was a case where the exercise of the court's discretion to pass a sentence of life imprisonment and whipping of 15 strokes was justified and commensurate with the facts of the offence. The imprisonment sentence under the first conviction shall run concurrently together with the terms of imprisonment under the second, third and fourth convictions. (paras 26 & 31)

Case(s) referred to:
Abdullah Atan v. PP & Other Appeals [2020] 9 CLJ 151 FC ***(refd)***
Bebou Akpo Bouraima lwn. PP [2017] 1 LNS 511 CA ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Chan Wei Loon v. PP & Another Appeal [2021] 6 CLJ 623 FC ***(refd)***
Kannan Rama Chenderan v. PP [2019] 1 LNS 1938 CA ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Mohamad Fauzi Ridzwan & Anor v. PP [2006] 1 CLJ 478 CA ***(refd)***
Muhammad Lukman Mohamad v. PP [2021] 7 CLJ 524 FC ***(refd)***
Obieguo Emmanuel Chukwunanu v. PP [2018] 1 LNS 1089 HC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Aris Mohd Nor [2019] 1 LNS 1555 CA ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Khairil Anwar Abdul Rahim [2016] 1 LNS 403 CA ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohd Fazelan Mohd Khuzeh [2015] 9 CLJ 221 CA ***(refd)***
PP v. Morah Chekwube Chukwudi [2017] 1 LNS 864 CA ***(refd)***
PP v. Muhammad Faiz Fazil Mahmud [2016] 1 LNS 523 CA ***(refd)***
PP v. Ramakrishnan Subramaniam & Ors [2012] 9 CLJ 443 CA ***(refd)***
PP v. Saifulzainizam Mat Nasir [2021] 1 LNS 1074 CA ***(refd)***
PP v. Shahrul Azuwan Adanan & Anor [2013] 2 CLJ 686 HC ***(refd)***
Tia Ah Leng v. PP [2004] 4 CLJ 77 CA ***(refd)***
Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***

Legislation referred to:
Abolition of Mandatory Death Penalty Act 2003, s. 54
Criminal Justice Act 1953, s. 3
Dangerous Drugs Act 1952, ss. 2, 12(2), (3), 37(da), 39B(1), (2), (2A), (2B)
Poisons Act 1952, s. 30(3), (5)

For the prosecution - Mohd Asri Abd Rahman Sidik & Mohd Nabilalif Mohd Rosli; DPPs
For the convicted accused - Paul Krishnaraja Selladurai & Amy Chong Chai Ling; M/s Paul, Amy Chong & Assocs

Reported by Najib Tamby

JUDGMENT

Mohd Radzi Abdul Hamid J:

Introduction

[1] This is the grounds of judgment on sentencing following four convictions against the accused ('convicted accused') at the end of defence case under the Dangerous Drugs Act 1952 ('DDA') and the Poisons Act 1952. He was convicted for offences under s. 39B(1) read with s. 39B(2) for the trafficking of 94.99g heroin ('first conviction'), s. 12(2) read with s. 39(2A) for the possession of 10.15g monoacetylmorphines ('second conviction') and s. 12(2) read with s. 12(3) for the possession of 4.21g methamphetamine ('third conviction') under the DDA, and s. 30(3) read together with s. 30(5) of the Poisons Act 1952 for the possession of phenazepam ('fourth conviction').

[2] This court convicted the accused on 23 May 2023. At the request of learned counsel for the accused, absent objection from the prosecution, the passing of sentence under s. 39B(2) was deferred until after the amendments under the DDA pursuant to the Abolition of Mandatory Death Penalty Act 2023 ('Act 846') took effect. The sentencing for all the remaining convictions was also deferred to the same date.

[3] Pursuant to the Federal Government *Gazette* P.U (B) 229, the Act 846 came into effect on 4 July 2023. The hearing for sentencing on all convictions was fixed on 14 August 2023.

[4] At the end of the hearing, this court sentenced the accused to two years imprisonment and three strokes of whipping under the second conviction, six months imprisonment under the third conviction and six months imprisonment under the fourth conviction. This grounds deal with the sentencing under the first conviction.

Background

[5] The charge under s. 39B(1) reads as follows ('charge'):

> Bahawa kamu pada 19.08.2015 jam lebih kurang 5.30 petang, di tepi jalan, Kampung Paya Rumput Dalam, Paya Rumput, di dalam daerah Melaka Tengah, di dalam Negeri Melaka telah mengedar dadah berbahaya jenis Heroin seberat 94.99 gram. Oleh itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[6] The facts of this case showed that two police officers were riding on motorcycles travelling along the road at Kampung Paya Rumput Dalam when they saw the convicted accused standing next to a car that was parked at the side of the road. The police officers stopped after seeing him behaving suspiciously. As they were approaching the convicted accused, they saw him

throwing a black plastic bag into some bushes. A search was done and the police found a black plastic bag containing dangerous drugs that are the subject matter of the charge. The dangerous drug heroin was found packed in six packets.

Submissions

Mitigation

[7] In his plea of mitigation for the convicted accused, learned counsel stated that the accused was a first offender, he was 25 years old of age at the time of arrest, he has a mother and a sibling and he did odd jobs to support the family. Although the amount of heroin was high that is 94.99g, the facts of the case showed that there was no involvement of an agent provocateur, he had given full cooperation to the police and he was not caught in the act of selling dangerous drugs. Based on those reasons, it was pleaded on behalf of the convicted accused that the death sentence is not appropriate to be passed in this case and that this court should instead sentence the convicted accused to life imprisonment and the minimum of 12 strokes of whipping.

By The Prosecution

[8] The Deputy Public Prosecutor appealed for a deterrent sentence commensurate with the seriousness and gravity of the offence. He further submitted that drug abuse has a serious impact on society and therefore, sentence should reflect the seriousness of the offence in the interest of the public.

Consideration By This Court

Judicial View On Drugs Related Offences

[9] The courts have consistently taken a strong and abhorrent view on drug related offences. In the Court of Appeal decision in *Tia Ah Leng v. PP* [2004] 4 CLJ 77; [2004] 4 MLJ 249; [2005] 5 AMR 93 Mokhtar Sidin JCA speaking for the court stated:

> It is true that the general rule is, when imposing a sentence, the court should take into consideration the fact that an accused person who has pleaded guilty be given certain credit and discount, but we are of the view that there are exceptions to this rule. In our opinion, one of these are the offences under the Dangerous Drugs Act 1952. The Government and the legislature have taken very serious views in the abuse of usage of dangerous drugs. Drug addictions are rampant and the Government as well as the legislature have tried to curb these addictions especially amongst youths but met with little success. Death sentences and heavy penalties have been introduced but we find drug addicts everywhere. The addiction to drugs have led to other offences such as thefts, burglary and snatch thefts. Some of these offences lead to serious consequences. We have read in the newspapers that some drug addicts have gone to the

extent of hurting their own families such as their mothers, sisters and grandmothers in order to get some money to purchase the drugs to support their addictions. Recently, a woman died when a snatcher snatched her handbag and she was dragged together with the handbag some distance away and as a result of that she died.

In our view, the source of all these evils are the drug traffickers and the drug peddlers. They are the ones who have been trafficking, selling and peddling the drugs to those drug addicts. It is public knowledge that the return in this type of business is very lucrative.

[10] Therefore, in deciding the appropriate sentence in drug offences, the court must take a strong stand against offenders by applying a deterrent approach to sentencing subject to the facts and circumstances of mitigation presented by the convicted accused. As said by Abang Iskandar Abang Hashim JCA (as His Lordship then was) in *PP v. Muhammad Faiz Fazil Mahmud* [2016] 1 LNS 523; [2016] 5 MLJ 476:

[14] Uppermost on our mind when dealing with this kind of an appeal is the factor of public interest. As is trite, criminal law is publicly enforced and the reason underlying that policy has been that a crime must be dealt with in such a way that would-be offenders would be deterred from committing similar offence. Granted that rehabilitation may also be a relevant factor to be considered in deserving cases, the Court invariably will lean in favour of meting out a deterrent sentence taking into account the kind of offence that was committed by the offender and the rampancy of such an offence. Having considered those factors, the Court will then see what the trend on sentencing for similar kind of offence that was being considered on appeal would be like. Having said that, the Court is well aware that there is no such thing as a 'one size fits all' kind of sentence for all offences. The law provides for a range of sentence within which the Court is empowered to mete out an appropriate sentences depending on the relevant factors as the circumstances of the case may present. (See generally, the case of *R v. Ball* [1951] 35 CrApp R 164 the oft-cited judgment of Hilbery J.)

General Statement On Mitigating And Aggravating Factors

[11] Harmindar Singh JCA (as His Lordship was then), in delivering the judgment of the Court of Appeal in *PP v. Khairil Anwar Abdul Rahim* [2016] 1 LNS 403; [2016] 3 MLJ 458, said:

[13] In drug cases, the mitigating factors that can usually be taken into account are a guilty plea, being a first offender or a young offender. The aggravating factors usually involve a consideration of the gravity of the offence, the type of drugs involved and the weight of the drugs. These considerations are by no means exhaustive as mitigating or aggravating factors. The paramount consideration in the end is public interest which may vary according to the circumstances of each case.

[12] In the oft-quoted Court of Appeal decision in *PP v. Morah Chekwube Chukwudi* [2017] 1 LNS 864; [2017] MLJU 958 the court had set out a list of circumstances that can amount to mitigating factors. They include:

(i) the gravity or severity of the facts constituting the offence;

(ii) the circumstances in which it was committed;

(iii) the rampancy of such offence in the area;

(iv) the offender's previous record;

(v) the offender's contribution and support to his family members;

(vi) the offender's means;

(vii) the effect of conviction and sentence on his job opportunities;

(viii) the age and health of the accused;

(ix) whether it is his first offence;

(x) whether the accused had cooperated with the police after the commission of the offence;

(xi) whether the accused had pleaded guilty;

(xii) status of the accused;

(xiii) whether there was violence during the crime; and

(xiv) public interest.

Amendments To s. 39B DDA

[13] Before delving into the merits of each party's arguments, it would be necessary to firstly touch upon the recent amendments made with regards to the abolishment of the death sentence pursuant to the Act 846.

[14] Now, despite that the preamble to the Act 846 states the Act is "... an Act to amend the Penal Code, the Firearms (Increased Penalties) Act 1971, the Arms Act 1960, the Kidnapping Act 1961, the Dangerous Drugs Act 1952, the Strategic Trade Act 2010 and the Criminal Procedure Code in order to abolish the mandatory death penalty, to vary the sentence relating to imprisonment for natural life and whipping, and to provide for matters connected therewith", the death penalty remains as one of the two sentences that can be meted out under s. 39B(2), the other being imprisonment for life and whipping. Section 54 of the Act 846 made changes to only two aspects of s. 39B. Firstly, it reduced the minimum number of whippings from 15 to 12 strokes, and secondly, it abolished ss. 39B(2A) and (2B) with regards to the statutory grounds permitting the court's exercise of discretion to pass a life imprisonment sentence together with whipping instead of death.

[15] Notwithstanding that the death penalty under s. 39B(2) remains unaffected by the Act 846, the abolishment of ss. 39B(2A) and (2B) brought about significant changes to the court's power in passing sentences. The abolishment of s. 39B(2A) effectively removed the "unless" effect of that provision, where unless the conditions in s. 39B(2A) can be satisfied, that is:

(i) there was no evidence of buying and selling of a dangerous drug at the time when the convicted person was arrested;

(ii) there was no involvement of an agent provocateur;

(iii) the convicted person's role was restricted only to transporting, carrying, sending or delivering dangerous drugs; and

(iv) the convicted person has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia then there is no sentence other than the mandatory death sentence that can be meted out by the court,

then the court would have no choice but to pass the death sentence. In other words, the Act 846 abolished the death penalty as a mandatory sentence.

[16] By removing s. 39B(2A), the statutory limits to the conditions that can justify the exercise of the court's discretion in passing a sentence of life imprisonment have now been removed. The power of the court is now enlarged to allow it to consider all other factors in exercising its discretion to pass a sentence of imprisonment for life and not be limited only to those grounds that were previously statutorily provided in s. 39B(2A). The current law now places total discretion in the hands of the court to decide whether, in any given case, a convicted person's life shall terminate at the gallows or spared under a life imprisonment with a minimum of 12 strokes of whipping.

[17] Although s. 39B(2A) is now abolished, it is this court's view that a convicted accused is not barred from relying on any or all of those factors as mitigating factors. A convicted person can still present any or all of those four factors together with any other factors or circumstances in mitigation. This adds to some of the examples of mitigating factors listed in *Morah Chekwube* (*supra*) that can possibly be considered by the court.

[18] On the same token, whilst all the grounds under the previous s. 39B(2A) can be offered as mitigating factors, the presence of the first three factors can, on the other hand, be relied on as aggravating factors by the prosecution in seeking the death penalty, that is:

(i) there was selling and buying of dangerous drugs when the convicted person was arrested;

(ii) there was involvement of an agent provocateur; and

(iii) the convicted accused's role is more than just mere transporting, carrying, sending or delivering of dangerous drug.

[19] In exercising its duties to determine the appropriate sentence, the court must take cognisance of the fact that although the Act 846 does not abolish the death sentence in its entirety, this Act was enacted with the spirit and intention to preserve life. Referring to the Hansard of the second and third reading of the Abolishment of Mandatory Death Penalty Act Bill 2023 dated 11 April 2023, the Deputy Minister of Law stated the following:

> Selain itu, hukuman mati yang telah dilaksanakan juga tidak boleh diperbaiki ataupun dipulihkan, dengan izin Tuan Yang di-Pertua, **you cannot undo the death penalty as it is irreversible.** Oleh itu, kita tidak boleh dengan sewenangnya mengabaikan kewujudan hak asasi untuk hidup ataupun dengan izin, **the inherent right to life** setiap individu. Pemansuhan hukuman mandatori di Malaysia bertujuan menghormati hak untuk hidup setiap individu di Malaysia sambil memastikan keadilan bagi semua pihak.
>
> Selaras dengan tujuan menghormati hak untuk hidup bagi setiap individu, prinsip asas di sebalik di setiap hukuman di Malaysia merupakan pemulihan ataupun, dengan izin, rehabilitation banduan agar mereka dapat kembali ke masyarakat dan menjadi individu yang dapat berkhidmat kepada keluarga, masyarakat dan negara setelah selesai menjalani hukuman.
>
> ...
>
> Sehubungan itu, pada 17 Mac 2023, Mesyuarat Jemaah Menteri telah bersetuju dengan cadangan hukuman gantian terhadap hukuman mati mandatori iaitu hukuman mati atas budi bicara mahkamah atau hukuman pemenjaraan bagi suatu tempoh yang tidak kurang daripada 30 tahun tetapi tidak melebihi 40 tahun dan juga hukuman sebatan tidak kurang 12 kali. Dengan pemberian budi bicara kepada mahkamah dalam menjatuhkan hukuman mati, mahkamah boleh mengambil kira prinsip undang-undang yang terpakai dalam memutuskan sama ada hukuman mati perlu dikenakan, iaitu antara lain terdapat anggapan yang memihak kepada hak seseorang untuk hidup yang tidak terbatas atau, dengan izin, unqualified right to life.
>
> Pertimbangan prinsip seterusnya adalah di mana hukuman mati boleh dikenakan dalam kes-kes yang sesuai dan mahkamah mempunyai peranan untuk menentukan kes-kes yang sesuai tersebut berdasarkan antara lain dahuluan ataupun precedent di dalam kes-kes serupa di negara-negara lain seperti India yang juga telah pun menghapuskan hukuman mati mandatori. Prinsip-prinsip yang harus dipertimbangkan, termasuk faktor-faktor mitigasi dan pemberatan ataupun, dengan izin, mitigating and aggravating factors. (emphasis added)

[20] Thus, in consideration of the spirit and intent of the Act 846, this court holds the view that, unless the aggravating factors are exceptionally serious and outweighs the mitigating factors in any particular case, life imprisonment and whipping should be the preferred sentences under s. 39B(2).

[21] On the subject of mitigation under the present law, it would be pertinent to ponder upon and consider the dissenting views of Nallini Pathmanathan FCJ in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277. Although the views expressed there were on the issue of the constitutionality of the mandatory death sentence, the consideration of the degree of culpability in relation to the role played by the convicted accused within the definition of trafficking is now relevant:

> [246] A study of the DDA will disclose that the Legislature has enacted the statute with a very wide definition of 'trafficking'. The term encompasses a vast array of activities including "... manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug ..."
>
> [247] It also makes it an offence for a person to be punished in respect of the trafficking of varying quantities of dangerous drugs. The DDA does not stipulate any minimum quantity of drugs required to establish the offence of trafficking, *albeit* a statutory minimum weight is stipulated in order to invoke the presumption of trafficking under s. 37(da). In other words, in terms of both the range of activities, and the weight of drugs concerned, the ambit of the offence is very wide.
>
> [248] The policy and object of the DDA is clear, namely to put an end to the dissemination of dangerous drugs in the country or to rid the country of this scourge. However, it is equally clear that by very reason of the wide ambit of these statutory provisions, the range of circumstances in which a person is charged and convicted of trafficking diverges greatly.
>
> [249] By way of example, convictions in the court range from persons who are routinely referred to as 'drug mules', who carry relatively small quantities of a proscribed drug, due to impecuniosity, ignorance or desperation to, at the other extreme, persons who strategise, plan and set up drug 'factories' at various hidden locations with a view to 'cooking' or manufacturing huge quantities of a cocktail of drugs, for consumption by large segments of the public, and who earn vast profits from their illicit activities. In between these two extremes are persons who 'traffic' for a variety of reasons with different levels of culpability.
>
> [250] Notwithstanding these huge disparities in the circumstances of the commission of the offence, the quantity involved and the types of persons involved, they are all grouped together in one large class as 'traffickers' who are all consequently subject to the sole mandatory punishment of death.
>
> [251] With the greatest of respect, it defies common sense to contend, even momentarily, that all these persons who fall within the vast definition of 'trafficking' have been classified, for the purposes of punishment only, on the basis of intelligible differentia, with a rational nexus to the object of the DDA. This is because there is no intelligible criteria for classifying them together for the purposes of imposing the

A same punishment of mandatory death, save for the purposes of establishing culpability for the offence of trafficking. In other words, while the rationale for classification may have basis for the purposes of establishing 'trafficking' so as to ensure that the wide range of activities are caught, this ought not to extend to punishment, which is a distinct and separable aspect of the crime. As such, it cannot be said that the
B classification is reasonable in so far as punishment or sentencing is concerned.

[252] The ultimate policy and object of the DDA is to prohibit the spread or perpetration or trading in drugs. To that end, the classification of a wide range of activities to enable the prosecution of all persons involved
C in the drug trade is tenable. And equally so for the purposes of proving guilt, given the difficulties otherwise involved in establishing the offence of 'trafficking'.

[253] However, to impose the same mandatory extreme and final punishment of death, to all persons falling within that range, lacks any
D rational basis. The diversity of persons and circumstances, not to mention the quantity of drugs involved, precludes such classification. On the contrary, such an imposition is irrational, arbitrary and capricious.

[254] The imposition of the death penalty as the sole punishment for trafficking, being unreasonable, unjust, unfair and devoid of any rational classification, infringes art. 8(1) FC.

E

[22] Taking those views into consideration, the role of a convicted accused in the spectrum of trafficking activities and the mitigating reasons for them must now be considered by the court in determining whether the passing of a death sentence is commensurate with the type of act of trafficking as defined
F under s. 2 of the DDA. That definition cannot now be taken as all-encompassing and one that fits all.

[23] In addition to that, the weight or volume of the dangerous drugs found in the possession of the convicted accused will be another key consideration. A distinction should now be made between cases where the amounts of
G dangerous drugs involved barely meets the minimum threshold for a presumption of trafficking under s. 37(da) of the DDA and those that are greatly in excess of that minimum. An amount that barely meets the minimum threshold or thereabouts should not, in the absence of any heavy aggravating factor, *prima facie* justifies the death sentence.

H **[24]** Thus, having considered all the possible aggravating and mitigating factors and keeping in mind the spirit and intent of the Act 846, in this court's view, the death sentence should only be reserved for exceptionally serious cases where the convicted accused:

I (i) served a major role in the act of trafficking (see *Letitia Bosman* (*supra*); *Mohamad Fauzi Ridzwan & Anor v. PP* [2006] 1 CLJ 478; [2006] 2 MLJ 15);

(ii) trafficked in large amounts or quantity of dangerous drugs or greatly in excess of the minimum threshold for the presumption of trafficking under s. 37(da) of the DDA (see: *Ong Ah Chuan v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64; *Muhammad Lukman Mohamad v. PP* [2021] 7 CLJ 524; [2021] MLJU 1015; *PP v. Saifulzainizam Mat Nasir v. PP* [2021] 1 LNS 1074; [2021] 5 MLJ 265);

(iii) was caught in the act of processing or manufacturing dangerous drugs (see: *Chan Wei Loon v. PP & Another Appeal* [2021] 6 CLJ 623; [2021] 4 MLJ 660);

(iv) trafficked dangerous drugs that were found individually packed in large amounts, that raises the inference they were meant for selling or distribution (see: *PP v. Mohd Fazelan Md Khuzeh* [2015] 9 CLJ 221; [2015] 6 MLJ 688);

(v) was caught in the act of selling large amounts of dangerous drugs;

(vi) had in his possession large quantity of paraphernalia for the processing, manufacturing or administration of dangerous drugs (see: *Saifulnizam Mat Nasir* (*supra*);

(vii) was caught giving instructions to others, in particular minors, in the act of processing, manufacturing, selling or distributing dangerous drugs;

(viii) used sophisticated methods to conceal, hide or transport dangerous drugs (see: *Wjchai Onprom v. PP* [2006] 3 CLJ 724; [2006] 5 MLJ 415; *Bebou Akpo Bouraima lwn. PP* [2017] 1 LNS 511; [2017] MLJU 477);

(ix) trafficked in large quantities of chemically processed dangerous drugs or designer drugs (see: *Khairil Anwar Abdul Rahim* (*supra*); *Obieguo Emmanuel Chukwunanu v. PP* [2018] 1 LNS 1089; [2018] MLRHU 849);

(x) had in his possession illegal arms or weapons when he was caught;

(xi) took life-threatening measures to resist arrest;

(xii) had multiple prior convictions; and/or

(xiii) acted in cohorts with corrupt members of any enforcement agency.

[25] Those factors are merely examples of exceptional aggravating factors that may, in this court's view, justify the death sentence. It would be up to the court to deliberate on and weigh them against all mitigating factors guided by established laws on sentencing (see: *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83) *PP v. Ramakrishnan Subramaniam & Ors* [2012] 9 CLJ 443; [2013] 2 MLJ 549; *PP v. Aris Mohd Nor* [2019] 1 LNS 1555; *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ; and *PP v. Shahrul Azuwan Adanan & Anor* [2013] 2 CLJ 686; [2013] 8 MLJ 70) and to find if any one of them or a combination of any number of those factors justify the court's exercise of discretion to pass the death sentence.

Decision

[26] Therefore, after hearing learned counsel for the convicted accused and the Deputy Public Prosecutor, this court finds that the mitigating factors in favour of passing a life sentence outweigh the aggravating factors. Although the amount of heroin was almost seven times more than the statutory minimum under s. 37(da) of the DDA, this court took into account the fact that the convicted accused was not caught in the act of selling dangerous drugs, he acted alone, there was no involvement of an agent provocateur, he was not caught in the act of processing or manufacturing dangerous drugs and he cooperated with the police at the time of arrest. Together with the other mitigating factors and in view of the spirit and intent of the Act 846, this court finds that this is a case where the exercise of this court's discretion to pass a sentence of life imprisonment and whipping of 15 strokes is justified and commensurate with the facts of the offence.

What Is Life Imprisonment?

[27] In the course of submitting on the factors of mitigation, learned counsel for the convicted accused contended that since the Act 846 did not make any specific amendment to the meaning of life imprisonment, then the meaning of life imprisonment under s. 3 of the Criminal Justice Act which was untouched by the Act 846 must apply. The prosecution did not offer a different view on the matter. Nonetheless, for the sake of brevity, it would be opportune for this court to make some remarks on the matter.

[28] Now, whilst the Act 846 had made specific changes to the Penal Code, the Firearms (Increased Penalties) Act 1971, the Arms Act 1960, the Kidnapping Act 1961, the Dangerous Drugs Act 1952, the Strategic Trade Act 2010 and the Criminal Procedure Code on the term of life imprisonment, it did not do the same for s. 39B(2).

[29] The DDA does not define the phrase imprisonment for life. The meaning of that phrase is sourced from s. 3 of the Criminal Justice Act 1953 (Revised 1988) that provides the term of life imprisonment to be 30 years. The Court of Appeal in *Kannan Rama Chenderan v. PP* [2019] 1 LNS 1938; [2019] MLJU 1680 held:

> [18] The sentence passed by us reflected the intention of Parliament when it amended the period of "imprisonment for life" in section 3 of the Criminal Justice Act 1953 (Act 345) which was increased from twenty to thirty years *vide* section 2 of the Criminal Justice (Amendment) Act 2007 (Act A1302). This amendment has been in force since 7.9.2007. Hence, the sentence passed by us was with due consideration of the maximum sentence provided under subsection 39A(2) of the Act read together with the amended section 3 of the Criminal Justice Act 1953 which is 30 years.

[30] It is noted that in amending all those other Acts of law under the Act 846 to stipulate that natural life and life imprisonment shall not be less than 30 years and not more than 40 years, the same was not done to s. 39B(2). The merits or otherwise of the legislator's decision on the matter is not the subject of this decision. Moving on, can the new provisions of the Criminal Procedure Code ('CPC') that now replace references to life imprisonment to be imprisonment of not less than 30 years but not more than 40 years be used as the source for the term for imprisonment for life under s. 39B(2)? In this court's view, that cannot be done because the DDA is a special Act and the CPC is only a general Act on the conduct of criminal proceedings (see: *Abdullah Atari v. PP & Other Appeals* [2020] 9 CLJ 151; [2020] 6 MLJ 727, *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119). As expressed by the Court of Appeal in *Kannan Rama* (*supra*), s. 39(2A) which provides for imprisonment for life must be read with s. 3 of the CJA. Therefore, it must similarly apply to s. 39B(2). In the absence of an amendment to s. 3, the term of imprisonment for life therefore remains to be 30 years. The legislators must have had intended for the term of life imprisonment to remain as 30 years as defined in the CJA and not between 30 to 40 years as stipulated in all those amended provisions in the Act 846.

[31] In conclusion, the convicted accused is hereby sentenced to imprisonment for life and 15 strokes of whipping under the first conviction. The imprisonment sentence shall run concurrently together with the term of imprisonment under the second, third and fourth conviction from 25 September 2020 which is the date the convicted accused was rearrested after the Court of Appeal allowed the prosecution's appeal against this court's decision to acquit him at the end of the prosecution's case.